



OFFICE of *the* ATTORNEY GENERAL  
GREG ABBOTT

February 5, 2003

Ms. Ruth Soucy  
Deputy General Counsel  
Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2003-0781

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176082.

The Comptroller of Public Accounts (the "comptroller") received a request for "the top three proposals for EAP services . . . a listing of all bidders, the prices submitted[,] and evaluation criteria scores." You state that there was only one qualified bidder, ComPsych, and that therefore only that single proposal is responsive to the request.<sup>1</sup> You explain that the requestor verbally modified his request to exclude private e-mail addresses, social security numbers, home addresses and home telephone numbers. Thus, such information is not responsive to the present request, and this ruling will not address that information. You state that some responsive information has been released to the requestor. You claim that the submitted information may be excepted from disclosure pursuant to section 552.110 of the Government Code. You make no arguments and take no position as to whether the submitted information is excepted from disclosure. You state, and provide documentation showing, that pursuant to section 552.305(d) of the Government Code, the comptroller

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<sup>1</sup>The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

notified ComPsych of the comptroller's receipt of the request and of ComPsych's right to submit arguments to this office as to why the requested information relating to its proposal should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have considered ComPsych's arguments and reviewed the submitted information.

We will first address your responsibilities under the Act. Subsections 552.301(a) and (b) of the Government Code provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

The comptroller received the request for information on October 16, 2002. However, you did not request a decision from this office until November 26, 2002, more than ten business days after the comptroller's receipt of the request.

You suggest that the ten-day deadline was tolled. You refer to the requestor's letter that you received on November 12, 2002, as a "clarification." We do not believe that the ten-day deadline was tolled in this instance. The ten-day deadline may be tolled during a clarification process between the requestor and the governmental body when a governmental body seeks clarification because a request is unclear or when the request is too broad. *See* Gov't Code § 552.222(b); Open Records Decision No. 663 at 5 (1999). The ten-day deadline is tolled during the clarification process but resumes on the day the clarification is received upon receipt of the clarification. *See* Open Records Decision No. 663 at 5. Here, you do not indicate that the request was unclear or too broad, or that the comptroller was seeking clarification of the request. Furthermore, you do not provide us with the date on which you

claim to have sought clarification from the requestor. Consequently, we are unable to determine whether the ten-business-day time period to request a decision was tolled prior to its expiration. Further, assuming the request for clarification was proper and timely, because the ten-business-day time period began to run again on the date the comptroller received the clarification from the requestor, we are unable to determine whether the comptroller sought a decision from this office prior to the expiration of a total of ten business days. Thus, we are unable to conclude that the comptroller complied with the requirements of section 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the deadlines in section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). ComPsych argues that the submitted information is excepted under section 552.110 of the Government Code. Section 552.110 of the Government Code provides a compelling reason to overcome the presumption of openness. *See Open Records Decision No. 150 (1977)* (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests). We will therefore address ComPsych's arguments.

ComPsych contends that portions of the requested information constitute trade secret information that is protected from disclosure under section 552.110 of the Government Code.<sup>2</sup> The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain

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<sup>2</sup>We note that ComPsych claims exceptions to the disclosure of fourteen categories of information contained in its proposal. However, the comptroller did not submit information responsive to category 2, "EAP Vendor Comparison," to this office for review, and therefore this ruling does not address that information.

an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>3</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

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<sup>3</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Based on our review of ComPsych's arguments and the submitted information, we find that ComPsych has presented us with a *prima facie* case that portions of this information constitute its trade secret information, and we have received no arguments that rebut this case as a matter of law. Thus, we conclude that the comptroller must withhold the information that we have marked pursuant to section 552.110(a).

We note that in applying the predecessor statute to section 552.110, this office held that information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing ordinarily may not be withheld under section 552.110. Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110), 184 (1978). Accordingly, we conclude that the comptroller may not withhold any portion of the remaining information at issue under section 552.110 of the Government Code.

ComPsych has noted that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Consequently, the comptroller must release the remaining submitted information to the requestor in compliance with copyright laws.

In summary, the comptroller must withhold the information that we have marked pursuant to section 552.110(a). The comptroller must release the remaining submitted information to the requestor in compliance with copyright laws.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

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complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 176082

Enc. Submitted documents

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